No. 14542

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER BANKS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

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INDEX

STATUTES

RULES OF PROCEDURE

TABLE OF CASES

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BRIEF OF APPELLEE

JURISDICTION

Appellee denies the jurisdiction of the Court of Appeals to hear this matter as an appeal from a final judgment of conviction as notice of appeal was not filed within the time prescribed by law, judgment appealed from having been entered on June 4, 1954, and notice of appeal having been filed September 2, 1954.

Federal Rule of Criminal Procedure 37; *Crow* v. *U. S.* (C. A.-9th; 1953) 203 F. 2d 670; *Wagner* v. *U. S.* (C. A.-4th; 1955) 220 F. 2d 513.

PRELIMINARY STATEMENT

Appellee, United States of America, finds itself in a peculiar position in answering Appellant's "brief" in this matter. Appellant's brief, as an examination will disclose, is replete with unsworn allegations of fact interspersed with arguments. Appellee by no means contends that any appellant should be denied his rights because of ineptness in procedural law or lack of familiarity with the orthodox methods of presenting an appeal. Appellee does, however, wish to present a preliminary apology to the Court of Appeals for the mode of answer and argument, a position to which it is forced by the peculiar nature of the material with which it is confronted.

STATE OF THE RECORD IN THE COURT OF APPEALS

The appeal in this case has been before the Court of Appeals for the Ninth Circuit on a number of occasions, e. g., March 21, 1955 — order denying motion for appointment of counsel; July 17, 1955 — order denying motion for clarification of the record; April 3, 1956 — order granting leave to proceed on typed

record and briefs; June 4, 1956 — order denying motion to proceed in forma pauperis. Not all of the above-named orders have been furnished to appellee, but the foregoing information has been furnished by the Clerk of the Court of Appeals and we assume it to be correct.

Appellee likewise assumes that this proceeding stems from the order of April 3, 1956, granting leave to proceed on *typed record* and briefs. If this assumption be correct, appellant has produced no record, typed or otherwise, and has ordered none from the court reporter.

WHAT IS THE NATURE OF THIS PROCEEDING?

Appellee is at a loss to understand exactly what the nature of this proceeding before the Court of Appeals is. From its nature, it may be considered to fall into one of six categories:

a. An appeal from a criminal proceeding in the trial court of the Northern Division, Western District of Washington.

b. An appeal from a denial of relief under 28 U.S.C. 2255 in the trial court.

c. An original proceeding under 28 U.S.C. 2255 in the Court of Appeals.

d. An appeal from a denial of habeas corpus relief (28 U.S.C. 2241) in the trial court.

e. An original habeas corpus proceeding in the Court of Appeals.

f. An appeal from the trial court's order of September 6, 1956, denying leave to proceed in forma pauperis.

* * * * * * * * *

a. This proceeding cannot be a conventional criminal appeal within the meaning of Federal Rule of Criminal Procedure 37 *et seq.* Appellant filed no notice of appeal until three months after the entry of judgment. This Court has already considered this point and dismissed appellant's motions based thereon. *Banks* v. *U. S.*, Misc. 413, January 31, 1955, Court of Appeals for the Ninth Circuit.

b. It cannot be an appeal from a denial of relief under 28 U.S.C. 2255 in the trial court. The record available to appellee indicates that a "motion attacking sentence" (which appellee construes to be a proceeding under 28 U.S.C. 2255) was disposed of by the trial court on October 26, 1954, in an order filed October 27, 1954, and transmitted to the Court of Appeals on October 28, 1954. No appeal appears to have been taken from this order.

c. It cannot be an original proceeding under 28 U.S.C. 2255 in the Court of Appeals. This Court has no jurisdiction. *Flynn* v. *U. S.* (C. A.-9th; 1955) 222 F. 2d 541.

d. It cannot be an appeal from a denial of habeas corpus relief in the trial court. A petition for habeas corpus relief was denied by the trial court by an order dated December 3, 1954. No appeal appears to have been taken from such order.

e. It cannot be an original habeas corpus proceeding in the Court of Appeals. This Court has no jurisdiction. *Meek* v. *California* (C.A.-9th; 1955) 220 F. 2d 348.

f. It cannot be an appeal from the trial court's order of September 6, 1956, denying leave to proceed in forma pauperis. That order does not appear to have been appealed from nor is it before this Court in any form. The Court of Appeals has twice denied appellant such relief. *Banks* v. *U. S.*, Misc. 413, January 31, 1955, and June 8, 1955, Court of Appeals for the Ninth Circuit. Nothing contained in appellant's brief bears on this issue.

However, be the foregoing as it may, appellee will assume that appellant's unsupported allegations are being considered in some manner by the Court of Appeals and will attempt to answer in kind.

I

There Is No Record Available For Review

Examination of appellant's brief discloses no transcript of the proceedings at the trial although his brief is replete with *ex parte* and unsupported allegations of what took place. There has thus been neither compliance with Federal Rule of Criminal Procedure 39 nor the Court's order of April 3, 1956, *supra*. While it is hornbook law to state that the Court cannot consider appellant's allegations absent a reporter's transcript, nevertheless *Wallace* v. *U. S.* (C.A.-8th; 1949) 174 F. 2d 112 holding that the record is insufficient for an appellate review is squarely in point. Appellee feels that this deficiency alone would support a motion to dismiss the appeal but will, nevertheless, attempt to deal with appellant's points in some detail.

II

Nature of Appellee's Evidence

In view of the fact that appellant has presented no reporter's transcript of proceedings at trial to the Court, appellee does not feel called upon to do so. The issue of appellant's right to such a transcript in forma pauperis has been passed upon by both trial and appellate courts. Appellee does not feel that appellant

can force it to produce a transcript simply to refute his unsworn allegations in his brief.

Appellee has, therefore, sought to assist the Court of Appeals by furnishing an affidavit from Richard D. Harris, the former Assistant United States Attorney who handled the case and the only one who can furnish disinterested testimony.

III

Denial of Right to Speedy Trial

Appellant first complains of the denial of his constitutional right to a speedy trial. Appellant states that he "did not acquiesce in the postponement of his trial." The affidavit of Richard D. Harris (page 1, lines 25-28) shows that the case was called for assignment nine (9) times before it was finally set. There is nothing before the Court to indicate that appellant, who was at liberty on bond, sought to accelerate his trial date on any of these occasions. Not having demanded a speedy trial, he waived the right to same. *Collins* v. *U. S.* (C.C.A.-9th; 1946) 157 F. 2d 409; *Danziger* v. *U. S.* (C.C.A.-9th; 1947) 161 F. 2d 299. Appellant's citations of *Henning* and *Frankel* are not in point. They both deal with petitions to the Court of Appeals for mandamus to compel the District Court to grant speedy trials *in futuro*.

IV

Denial of Witnesses for Defense

Appellant would seek to have the Court of Appeals believe that subpoenae for his essential witnesses were timely served, that the witnesses failed to appear and a continuance was denied. The true state of affairs is revealed by the affidavit of Richard D. Harris (page 2, line 4 to page 3, line 10). Appellant claims that these witnesses were essential to his defense of entrapment. If this be so, then appellant *must* have known from December 22, 1952, to and including the date of trial, April 27, 1954, a period of sixteen months, that (a) he possessed and transferred the narcotics, and (b) that his defense consisted not of a denial but rather of an admission coupled with the defense of entrapment. Under these circumstances, failure to summon *any* witnesses until April 19, 1954, (the day before the original trial date) and the particular witnesses of whose absence complaint is made (so far as the available record discloses) was inexcusable remissness on the part of appellant, not an abuse of discretion by the judge. *Neufield* v. *U. S.* (C.A.D.C.-1941) 118 F. 2d 375 at 385:

> "An accused cannot omit to inform his lawyer *during an extended period — in this case approximately eight weeks* [i. s.]—before trial of the existence of a possible material witness and then successfully charge the trial judge with an abuse

of discretion for refusing a demand for the production of the witness not made until the moment the case is called."

V.

Hostile Comments of the Trial Judge

Appellant's theory, as embodied in his brief, under this heading amounts to an allegation of prejudice by reason of the trial court's (a) expediting the trial, and (b) instructing the jury that leniency was not within their province in deliberating on guilt or innocence.

The *Quercia* case cited by appellant involved a trial court's (under the guise of commenting on the evidence) departure from that field entirely and confining himself to an attack on the credibility of the defendant, a clear invasion of the jury's province. In this aspect of this appeal, as in all the others, the absence of a reporter's transcript prevents an intelligent assessment of whatever comments the trial court is alleged to have made. " . . . comments of the court must be read in their context and viewed with a perspective of the whole proceedings." *Ochoa* v. *U. S.* (C.C.A.-9th; 1948) 167 F. 2d 341 at 344. Appellant cannot single out a few isolated words and base an appeal thereon. The affidavit of Richard D. Harris (page 3, lines 12-29) raises a profound doubt that the

comment about "rattling off" was ever made. If it was made, it could scarcely (under the fact situation revealed by Mr. Harris's affidavit) have been other than an effort to expedite a lagging trial. *Williams* v. *U. S.* (C.A.-8th; 1954) 216 F. 2d 529, Headnote 6 is directly in point.

As to the alleged comment of the trial court that the jury should not consider leniency, the statement if made was quite clearly correct law and could not have operated to appellant's detriment. *Gantz* v. *U. S.* (C.C.A.-8th; 1942) 127 F. 2d 498 at 504.

In any event, there is no record of objection or exception to the trial court's remarks, if such were made. *Baldwin* v. *U. S.* (C.C.A.-9th; 1934) 72 F. 2d 810.

VI

Failure to Instruct On Entrapment

Since there is no record of the evidence before the Court, the Court cannot consider the failure of the trial court to instruct on the theory of the law set out in appellant's brief. *Baldwin* v. *U. S.* (C.C.A.-9th; 1934) 72 F. 2d 810.

There is no record showing defendant-appellant's requested instructions, if such were correct and if such

were requested. *Andrews* v. *U. S.*, 162 U.S. 420, 40 L.Ed. 1023, 16 S.Ct. 798 (1896).

The Clerk's minutes for the day on which the Instructions were given indicate, if only in a negative way, that (a) instructions *were* given, and (b) that no exceptions were noted to the instructions given, or requested instructions, if any, omitted.

VII

Failure to Direct a Verdict of Acquittal

Appellant's raising this point on appeal can only be ascribed to his lack of understanding as to what a directed verdict of acquittal amounts to. Appellant in his brief seeks either to re-argue evidence which has already been passed upon by a jury or, at best, to show that there was a conflict between his evidence and that presented by the appellee. The citations are legion to the effect that, upon conflicting evidence, a judgment of acquittal should not be granted. *Gorin* v. *U. S.* (C.C.A.-9th; 1940) 111 F. 2d 712 at 721.

CONCLUSION

For the reasons above set forth and especially in view of the failure of appellant to present any transcript of evidence in support of his claimed errors, it is submitted that the appeal should be dismissed. If this Court on this record concludes to act thereon, every conviction of any defendant which has not been affirmed by the Circuit Court is open to a similar proceeding.

Respectfully submitted,

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